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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 429

SEAWAY BEVERAGES, INC.,
Petitioner,

vs.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, DWIGHT E. AVIS, DIRECTOR OF ALCOHOL AND TOBACCO TAX DIVISION OF INTERNAL REVENUE SERVICE, AND THE UNITED STATES OF AMERICA,
Respondents.

REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUTHROP-WARREN PRINTING COMPANY, CHICAGO

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This reply is limited to what the petitioner deems to be important errors in the respondents' brief:

1. Respondents state that "the denial of the permits was based entirely on Volpe's relationships . . . with Cerone and Accardo" (page 4) and the statement on pages 2 through 6 discusses Volpe's dealings with Cerone, whereas the Director of the Alcohol and Tobacco Tax Division expressly held in his order that "I do not feel that these factors alone [in regard to Cerone] are of sufficient consequence to support a denial of these applications" (JA 492).

2. Respondents state that "this case does not involve the denial of a permit on the basis of an applicant's mere 'associations'" (page 9), whereas the specified ground for the denial of the permits (JA 40-42; respondents' brief, page 3) and the decision of the hearing examiner was based entirely upon the "association" of Volpe with Accardo (JA 453-4). Respondents in their brief admit that the denial of the permits was based entirely on Volpe's associations (pages 4-6).

3. Respondents state that "the decision of the Director turned, not upon Volpe's associations at large, but upon the direct participation in the hiring of a person with a reputation as a notorious racketeer to be a 'salesman' of alcoholic beverages" (page 9), whereas the Hearing Examiner expressly found that (JA 451):

> "There is no evidence that Volpe had ever done any business with Accardo prior to Accardo's employment by Premium. *The negotiations leading up to this employment were initiated by Feicht.* . . ."

4. The respondents state at page 10 that "from Volpe's demonstrated willingness to participate in bringing reputed racketeers into the alcoholic beverage industry when his job depended upon it, it was reasonable, we submit, for the Director *to draw the inference* that Volpe would be likely to pursue a similar course in the future if the financial success of his new corporation should depend upon it. . . ." It is impossible for the Director to draw such an inference in view of the express findings of the Hearing Examiner, which were affirmed by the Director as follows (JA 451-2):

> "34. No evidence was adduced that any person of ill repute is a shareholder, officer, director, employee or agent, of, or associated or connected in any way with the applicant. . . .

"35. *Volpe testified that he would not hire any person of ill repute, even if it were to his economic advantage to do so.* . . .

"36. Volpe has never been arrested or convicted of any crimes of any kind, nature or description. . . .

"37. Volpe testified that he is not and has never been a member of any syndicate or ring of hoodlums, that he is not a front for any such syndicate or ring or any other person and that *no person other than those set out in the application would have any interest in the business for which he seeks a permit and no contrary evidence is adduced.* . . .

"38. Evidence shows that Volpe has a good general reputation as attested by some fifteen witnesses.

"39. *Several witnesses testified without contradiction that they were familiar with the permit system of the liquor industry and that in their opinion Volpe would act in conformity with the Federal laws and that he is a decent law abiding citizen.*".

If the administrative agency is permitted by the statute to make inferences and reach conclusions directly contrary to its findings, then the statute clearly does not establish constitutional standards.

5. Respondents' only answer to the petitioner's argument that the statutory standard is so vague as to be unconstitutional as a delegation of legislative power is the citation of *Ma-King Products Co.* v. *Blair*, 271 U. S. 479 (1926). In that case, the applicant sought a permit under the National Prohibition Act to operate a plant for denaturing alcohol. The principal officers of the corporate applicant had been involved with business associates who were violators of the prohibition laws.

The *Ma-King* case did not pass upon the constitutionality of the Prohibition Act, but even if it had, the Prohibition Act is clearly distinguishable from the Federal Alcohol Administration Act. This Court said in that case at page 482 that the National Prohibition Act "does not provide

that the Commissioner *shall* issue any legal permit, but merely that he *may* do so."

Not only has no associate of the petitioner in this case nor of Volpe ever been convicted of violation of the Federal Alcohol Administration Act or of any crime or violation of law, but that Act provides that an applicant "*shall . . . be entitled to a basic permit*" unless the Secretary of the Treasury finds certain conditions to exist, one of which is that the applicant is "not likely" to maintain operations in conformity with federal law, which condition has been attacked by the petitioner herein as unconstitutional. As stated by the petitioner in its petition, the validity of this provision of the Federal Alcohol Administration Act has never been tested in the courts.

6. Respondents contend that the introduction of Accardo's income tax returns, of his (later reversed) conviction and of newspaper clippings describing him "were only cumulative evidence" (pages 11-12). Respondents failed to meet petitioner's point that this evidence was prejudicial and caused the denial of the permits, as shown by the erroneous treatment of this evidence by the Court of Appeals, which error has not been commented on by the respondents.

Conclusion.

For the foregoing reasons and those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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